Supreme Court, U.S.
FILED
OCT 20 1999
OFFICE OF THE CLERK

No. 99-478

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. FARMER, JR.
Attorney General of New Jersey
LISA SARNOFF GOCHMAN
Deputy Attorney General
Attorney of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. Box 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

October 20, 1999

QUESTION PRESENTED

Whether existing United States Supreme Court precedent firmly supports the conclusion reached by the Supreme Court of New Jersey that the extended term sentencing provision of the Hate Crime Statute, *N.J.Stat.Ann.* 2C:44-3e (West 1995), preserves a defendant's federal constitutional rights to due process of law, notice by indictment and trial by jury?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 8

CONCLUSION 16

TABLE OF AUTHORITIES

CASES CITED: **Page**

Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998) 11,12 13,14

Graham v. West Virginia, 224 U.S. 616 (1912) 12

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999) 12,13 14

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 10,11 13

Miranda v. Arizona, 384 U.S. 436 (1966) 5

Mullaney v. Wilbur, 421 U.S. 684 (1975) 11

Specht v. Patterson, 386 U.S. 605 (1967) 14

State v. Beard, 16 N.J. 50, 106 A.2d 265 (1954) 10

State v. Cherry, 289 N.J. Super. 503, 674 A.2d 589 (App Div. 1995) 10

State v. Federico, 103 N.J. 169, 510 A.2d 1147 (1986) 12

State v. Harmon, 104 N.J. 189, 516 A.2d 1047 (1986) 2,10

State v. Mortimer, 135 N.J. 517, 641 A.2d 517, *cert. denied*, 513 U.S. 970 (1994) 10

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 10

STATUTES CITED

N.J.Stat.Ann. 2C:39-3a 2

N.J.Stat.Ann. 2C:39-4a 2,9

N.J.Stat.Ann. 2C:43-6a(1) 3

N.J.Stat.Ann. 2C:43-6a(2) 3,11

N.J.Stat.Ann. 2C:43-6c. 6

N.J.Stat.Ann. 2C:43-7a(3) 3,11

N.J.Stat.Ann. 2C:44-3e . . . . . *passim*

42 *Pa.Const.Stat.Ann.* § 9712 13

8 *U.S.C.* § 1326(a) 11,14

8 *U.S.C.* § 1326(b)(2) 11,14

18 *U.S.C.* § 2119 12

RULES CITED

N.J. Court Rule 2:2-1(a)(2) 7

N.J. Court Rule 3:21-4(e) 14

OPINIONS BELOW

Respondent (hereinafter the State) concurs with the statements set forth in the petition.

JURISDICTION

The State concurs with the statement set forth in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State concurs with the statements set forth in the petition.

STATEMENT OF THE CASE

In the early morning hours of December 22, 1994, petitioner Charles Apprendi, Jr., a white pharmacist, fired several rounds from a loaded rifle into a nearby single-family house, using as targets two black Santa Claus decorations hanging on the front door. The residents, Michael and Mattie Fowlkes and their three children, ages 9, 13 and 16, were the only black family living in petitioner's otherwise all-white neighborhood in Vineland, New Jersey. (Pa2-3, 100-02, 107-09).[1]

Petitioner was charged by the Cumberland County, New Jersey, Grand Jury in a twenty-three count indictment with four counts of attempted murder in the first degree, four counts of aggravated assault in the second degree, four counts of possession of a firearm for an unlawful purpose in the second degree, four counts of unlawful possession of a loaded

---

[1] "Pet." refers to the petition for *certiorari*;
"Pa" refers to the appendix to the petition for *certiorari*;
"T" refers to the plea transcript dated July 24, 1995.

rifle in the third degree, unlawful possession of an incendiary device in the third degree, unlawful possession of an anti-personnel bomb in the third degree, four counts of harassment in the fourth degree, and unlawful possession of a firearm silencer in the fourth degree. (Pa3).

On July 24, 1995, petitioner entered a guilty plea before the Honorable Rushton H. Ridgway, J.S.C., to counts three and eighteen of the indictment charging second degree possession of a firearm for an unlawful purpose, contrary to *N.J.Stat.Ann.* 2C:39-4a (West 1995), and count twenty-two charging third degree unlawful possession of an anti-personnel bomb, contrary to *N.J.Stat.Ann.* 2C:39-3a (West 1995). (T3-14 to 4-16, 5-18 to 23, 10-13 to 21). Petitioner admitted at the plea hearing that his unlawful purpose for shooting at the Fowlkes' house was to frighten or harass the family. (T22-4 to 29-18).

Through petitioner's guilty plea, the State satisfied its burden to prove beyond a reasonable doubt the four elements of possession of a weapon for an unlawful purpose under *N.J.Stat.Ann.* 2C:39-4a: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against the person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

The prosecution timely served petitioner with notice that it was seeking an enhanced term of imprisonment on count eighteen pursuant to *N.J.Stat.Ann.* 2C:44-3e (West 1995), the extended term provision of New Jersey's "Hate Crime Statute." (T9-20 to 10-8; Pa166). Under this statute, the same criminal conduct may be more heavily punished if "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* Upon application of the prosecuting attorney,

an extended term must be imposed if the sentencing court "finds, by a preponderance of the evidence, the grounds in subsection e." *Id.* The ordinary sentencing range for a second degree crime is between five and ten years, *N.J.Stat.Ann.* 2C:43-6a(2) (West 1995). The extended sentencing range for a second degree crime is between ten and twenty years, *N.J.Stat.Ann.* 2C:43-7a(3) (West 1995), which is the ordinary sentencing range for a first degree crime. *N.J.Stat.Ann.* 2C:43-6a(1) (West 1995).

At the extended term sentencing hearing held before Judge Ridgway, Michael Fowlkes recalled that on December 22, 1994, he and his wife awoke at 1:55 a.m. to the sounds of gun shots and shattering glass. Eight bullets had been fired at their house, and the front French doors, which were panes of clear glass set in a burgundy frame, were riddled with bullets. (Pa107-09). One of the bullets lodged in the wall of their daughter's bedroom. (Pa109).

Petitioner was arrested shortly thereafter, and he admitted to Detective Dennis D'Augostine that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. Petitioner knew that a black family lived there because he had seen them outside in the yard, but he did not know the victims personally. (Pa174-78, 299).[2]

---

[2] Petitioner claims that "the police department had espoused the theory that the shooting of the house was racially motivated long before the petitioner was interrogated" (Pet. at 5) to support the notion that D'Augostine was "hunting for a racist motive for what [petitioner] did." (Pa241). D'Augostine was unaware until after he interviewed petitioner, however, of the statement of Mattie Fowlkes taken by a Detective Valentine on November 14, 1994, in which she expressed her belief that earlier shootings at her house were racially motivated. (Pa289-299).

Petitioner presented seven character witnesses at the hearing who testified that defendant did not have a reputation for racial bias against blacks. (Pa182-203).

Petitioner also presented the opinion of Doctor Gerald Cooke, a psychologist who examined petitioner at the Cumberland County Jail on February 15, 1995. (Pa204-07). According to Doctor Cooke, petitioner told him that he had consumed eight alcoholic beverages and some medication on December 22, 1994, and had "feelings that he wanted to destroy something" when the Fowlkes' purple door caught his attention. (Pa210-11). After firing at the Fowlkes' front door, petitioner returned home, hid the gun and went to sleep. (Pa211). The police arrived twenty minutes later and told him that if he cooperated "they would be less stringent." (Pa211-12). Doctor Cooke admitted that he had "no way of knowing" whether petitioner told him the truth during the interview. (Pa228).

Doctor Cooke ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). The doctor did find, however, a pattern of alcohol abuse and drug dependency. (Pa208-09). He concluded that petitioner had an obsessive-compulsive disorder, mood swings and an impulse disorder of kleptomania. (Pa216-18). The synergistic effect of the drugs and alcohol, combined with petitioner's "anxious and overcontrolled" personality, created "the kind of personality of an individual who would [tell a lie] to get out of this kind of situation." (Pa218-19). Doctor Cooke acknowledged that petitioner had never been treated for any psychiatric disorders or alcohol and drug abuse, and was in fact employed as a pharmacist at the time of the shootings. (Pa223).

Petitioner testified on his own behalf. He claimed that when the police came to his house at 3:00 a.m. of the morning of his arrest he was "extremely exhausted and depressed." Petitioner alleged that he had drank three or four vodka drinks

several hours before and had taken medication for his "irritable bowel syndrome," an "opiate" and a "minor tranquilizer." (Pa236-39). Petitioner denied being a racist and claimed that he admitted to a having a racial bias only because Detective D'Augostine was scaring him with stories of homosexuality and AIDS among the prison population. (Pa242-45).

On cross-examination, petitioner admitted that when the "glass and purple door ... caught [his] eye," he went home, retrieved his rifle and returned to the Fowlkes' residence. (Pa251-52). The rifle was equipped with a "red-dot" scope for accurate aim, as well as a silencer, which he characterized as "toys." (Pa252-53). Petitioner admitted that it would be in his best interest to tell Judge Ridgway that he is not a racist. (Pa255-56).

On rebuttal, Detective D'Augostine testified that petitioner "clearly understood" his *Miranda* rights. (Pa281). In response to the detective's question, petitioner stated that although he had consumed two alcoholic drinks in the late afternoon and two more at 10:30 p.m., he was not under the influence of any alcohol or drugs. (Pa283). Petitioner's breath bore no odor of alcohol, his eyes were not bloodshot, he did not sway and he answered the detective's questions clearly. (Pa284). Petitioner admitted that he fired at the Fowlkes' house on two separate occasions. (Pa288-89). The detective never threatened petitioner, nor did he promise leniency if he cooperated. (Pa286). The interview was immediately terminated when petitioner requested an attorney. (Pa289). Petitioner stipulated that his confession was given in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). (Pa172).

Judge Ridgway found Detective D'Augostine to be credible and "had difficulty believing that [petitioner] was attracted to [the Fowlkes' front] door by the color. And that something went off in his ... intoxicated state of mind that he

wanted to destroy the door." (Pa142-43). The judge recalled petitioner's admission under oath at the plea proceeding that his unlawful purpose in shooting at the Fowlkes' house was to scare the occupants. The court was satisfied that petitioner's act was motivated by racial bias and that petitioner was now denying any such prejudice so as to avoid the enhanced punishment for a bias crime. (Pa143-44). Judge Ridgway found that the State met its burden of proving by a preponderance of the evidence that petitioner's act was racially motivated and, therefore, petitioner was subject to an extended term of imprisonment. (Pa145). Petitioner was sentenced on count eighteen to an extended custodial term of twelve years with a mandatory period of parole ineligibility of four years. (Pa161).[3]

In a published opinion filed August 19, 1997, the Superior Court of New Jersey, Appellate Division, affirmed petitioner's convictions and sentences and declared *N.J.Stat.Ann.* 2C:44-3e constitutional. *State v. Apprendi*, 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997) (Pa81-94). The majority found that the statute did not make racial bias an essential element of the predicate crime. The statute was aimed at deciphering a defendant's motive, a traditional sentencing factor. The imposition of an extended term of imprisonment following a finding of bias by the sentencing court by a preponderance of the evidence standard did not

---

3 The mandatory minimum term was not imposed pursuant to the Hate Crime Statute but was authorized by *N.J.Stat.Ann.* 2C:43-6c (West 1995), because defendant was convicted of possession of a firearm with intent to use it against the person of another. (Pa4).

On count three, petitioner was sentenced to an ordinary term of seven years imprisonment with a mandatory period of parole ineligibility of three years, to be served concurrently to the term imposed on count eighteen. On count twenty-two, petitioner was sentenced to an ordinary term of three years imprisonment, to be served concurrently to the terms imposed on counts three and eighteen. (Pa161).

violate the constitutional requirement that the State must prove each element of an offense by the reasonable doubt standard. (Pa86-94).

The concurring member of the panel agreed that *N.J.Stat.Ann.* 2C:44-3e was constitutional under the majority's analysis, adding that the sentencing enhancer of the Hate Crime Statute appears in the general sentencing provisions of New Jersey's Code of Criminal Justice and was adopted after the Code's provisions establishing the crimes. The concurring judge compared the Hate Crime Statute to New Jersey's Graves Act which mandates ineligibility terms on sentences where a judge finds by a preponderance of the evidence that a defendant used or possessed a firearm, notwithstanding that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. (Pa77-80).

The dissenting judge believed that the word "purpose" as used in the Hate Crime Statute was synonymous with "intent" and was thus an element of the predicate offense that had to be proven by the finder of fact beyond a reasonable doubt. (Pa68-76).

Petitioner filed with the Supreme Court of New Jersey an appeal as of right from the dissent in the Appellate Division pursuant to *N.J. Court Rule* 2:2-1(a)(2).

On June 24, 1999, the Supreme Court of New Jersey affirmed the Appellate Division opinion and determined that the Hate Crime Statute did not violate the United States Constitution. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). Analyzing the Hate Crime Statute under relevant United States Supreme Court precedent, the court found that petitioner's biased motivation behind the shooting was a sentencing factor to be resolved by the sentencing judge, and not an element of the offense requiring a jury finding beyond a reasonable doubt:

> We find that the provision has been narrowly tailored to meet First Amendment concerns, and represents a legislative attempt to comply with a constitutional mandate, not a legislative attempt to circumvent due process rights to trial by jury.
>
> * * *
>
> [T]he Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the [*United States v.] Almendarez -Torres* analysis, is a very traditional sentencing factor.
>
> [Pa2, 22].

Two of the seven members of the court dissented, finding the statute violative of the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment of the United States Constitution. (Pa29-66).

REASONS FOR DENYING THE PETITION

In determining that petitioner's racial bias motivating his shooting of a loaded rifle at the Fowlkes' house was a sentencing factor subject to the "preponderance of the evidence" standard, and not an essential element of the underlying crime of possession of a weapon for an unlawful purpose requiring a jury finding of guilt beyond a reasonable doubt, the Supreme Court of New Jersey faithfully applied the constitutional calculus formulated by this Court in a series of decisions addressing the so-called "sentencing factor versus element" debate. The statutory scheme created by the extended term provision of New Jersey's Hate Crime Statute, *N.J.Stat.Ann.* 2C:44-3e (West 1995), punishes motive, not criminal intent, and thereby guarantees petitioner's Sixth

Amendment right to notice by indictment and trial by jury, and Fifth and Fourteenth Amendments right to due process of law. See *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). This adherence to United States Supreme Court precedent means that the issue decided by the state court may implicate federal constitutional provisions, but ultimately fails to present "an important question of federal law that has not been, but should be settled by this Court," or "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).[4] Simply put, there are no "compelling reasons" for this Court to grant this petition for a writ of *certiorari*. Supreme Court Rule 10.

At the time petitioner entered his guilty plea to possession of a weapon for an unlawful purpose, *N.J.Stat.Ann.* 2C:39-4a (West 1995), the extended term provision of New Jersey's Hate Crime Statute required the sentencing court to impose an increased maximum term of imprisonment if, after a hearing, the State proved by a preponderance of the evidence that in committing the predicate offense the defendant acted "with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." Petitioner confuses motive (the *sine qua non* of New Jersey's Hate Crime Statute) with criminal intent (the *sine qua non* of New Jersey's unlawful possession of a weapon statute) to claim that the Hate Crime Statute unconstitutionally allows the sentencing court to decide, by a preponderance of the evidence, a defendant's mental state under a statute which can increase the maximum sentence. (Pet. at 3).

---

[4] Certainly, the final resolution of the federal constitutional question invoked by New Jersey's Hate Crime Statute does not conflict with any decision of any other state court of last resort or of a United States court of appeals. Supreme Court Rule 10(b).

Petitioner's argument that *N.J.Stat.Ann.* 2C:44-3e punishes criminal intent stems from the statute's reference to the accused's "purpose to intimidate." The *Apprendi* court, however, equated "purpose to intimidate" with "motive," (Pa22), and this Court is "bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). Motive has been recognized by this Court to be a traditional sentencing factor. *Id.* at 485; *see also State v. Mortimer*, 135 N.J. 517, 528, 641 A.2d 517, 528, *cert. denied*, 513 U.S. 970 (1994). Motive, not criminal intent, is what New Jersey's Hate Crime Statute punishes.

By petitioner's own admission at the plea hearing, his criminal intent or *mens rea*, that is, his unlawful purpose for shooting at the Fowlkes' house, was to frighten or harass the family asleep inside. (T22-4 to 29-18). Petitioner's reason for wanting to scare the family, that is, his motive, was to send the Fowlkes family "a message" that blacks were unwelcome in petitioner's neighborhood. (Pa174-78, 299). While the prosecution bore the burden to prove petitioner's criminal intent (his unlawful purpose) behind the shooting (his conduct), it had no burden to prove that his conduct was influenced by racial hatred (his motive). Motive is relevant to the issue of intent but is not an essential element of any crime in New Jersey, *State v. Beard*, 16 N.J. 50, 60-61, 106 A.2d 265, 270 (1954); *State v. Cherry*, 289 N.J. Super. 503, 529, 674 A.2d 589, 602 (App Div. 1995), including possession of a weapon for an unlawful purpose. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

New Jersey's Hate Crime Statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). *N.J.Stat.Ann.* 2C:44-3e does not create any impermissible presumptions nor relieve the prosecution of its burden of proving guilt; indeed, it is entirely inapplicable unless the prosecution first proves a defendant's guilt of the underlying

offense beyond a reasonable doubt. *See McMillan*, 477 U.S. at 87. The differential in sentencing is not between a nominal fine and mandatory life sentence, *see Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975), but merely increases the ordinary sentencing range for a second degree offense of between five to ten years, *N.J.Stat.Ann.* 2C:43-6a(2) (West 1995), to an extended range of between ten and twenty years, *N.J.Stat.Ann.* 2C:43-7a(3) (West 1995). The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. *See McMillan*, 477 U.S. at 89-90; see also Pa20-22. The New Jersey Legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the weight to be given that factor...." *McMillan*, 477 U.S. at 89-90.

Although the *McMillan* Court speculated in *dicta* that the claim that a sentencing factor was really an element of the offense "would have at least more superficial appeal" if a finding of such fact exposed the defendant to greater or additional punishment, *id.* at 88, that consideration was subsequently criticized in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998), in which this Court rejected the argument that any factor triggering an increase in the maximum permissive sentence is an element of the offense which must be proven beyond a reasonable doubt.

In *Almendarez-Torres*, this Court held that subsection (b)(2) of 8 *U.S.C.* § 1326 did not describe an element of an offense but was simply a sentence enhancer. Subsection (a) of this statute defines a crime by forbidding an alien who once was deported to return to the United States without special permission, and it authorizes the imposition of a prison term of up to, but no more than, twenty years for "an alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." 8 *U.S.C.* § 1326(b)(2). The validity of this

sentencing scheme was due, in part, to the "longstanding tradition of treating recidivism as 'going to the punishment only.'" *Almendarez-Torres*, 118 S.Ct. at 1230-31 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)).

Recently revisiting the sentencing factor/element question in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), this Court determined that a penalty provision based on a finding of serious bodily injury or death intertwined within the definition of the substantive crime of carjacking under the federal carjacking statute, 18 *U.S.C.* § 2119, was not a sentence enhancer that could be found by the sentencing court by a preponderance of the evidence, but was historically an element of the offense that had to be proven to the trier of fact beyond a reasonable doubt. The federal carjacking statute was structurally muddled in its treatment of injury as an element or penalty factor, thus prompting the *Jones* Court to consider the "traditional treatment of certain categories of important facts ... in relation to particular crimes." *Jones*, 119 S.Ct. at 1220. Under this approach, the enhanced penalty provision of the federal carjacking statute could not be viewed as a mere sentencing factor because the degree of injury to a victim has traditionally been treated, both by Congress and by state legislatures (including New Jersey, *see State v. Federico*, 103 N.J. 169, 510 A.2d 1147 (1986)), as an element of the predicate offense, such as aggravated robbery. *Jones*, 119 S.Ct. at 1220.[5]

---

[5] This Court also took a structural approach in *Almendarez-Torres*, 118 S.Ct. at 1224-26, and in *Jones*, 119 S.Ct. at 1219-1222, to determine whether Congress intended to create new substantive offenses. Under this analysis, the extended term provision of New Jersey's Hate Crime Statute is clearly constitutional. The statute appears in a general sentencing provision of New Jersey's Code of Criminal Justice entitled "Authority of Court in Sentencing," and was adopted long after the Code's provisions establishing the underlying crimes. *State v. Apprendi*, 304 N.J. Super. 147, 160, 698 A.2d 1265, 1272 (App. Div. 1997) (Stern, J., (continued...)

In reaching this result, this Court was careful not to overrule its prior decision in *Almendarez-Torres* that "not every fact expanding a penalty range must be stated in a felony indictment." *Jones*, 119 S.Ct. at 1226-27. Instead, the *Jones* Court acknowledged that recidivism, the factor in issue in *Almendarez-Torres*, historically is treated as a sentencing enhancer and is "potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Jones*, 119 S.Ct. at 1227. Similarly, the instrumentality used in committing a violent felony "has always been considered by sentencing courts to bear on punishment." *McMillan*, 477 U.S. at 89-90 (this Court found constitutional a provision of Pennsylvania's Mandatory Minimum Sentencing Act, 42 *Pa.Const.Stat.Ann.* § 9712, authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge finds, by preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense).

---

[5](...continued)
concurring) (Pa79). The statute is expressly designated "Criteria for sentence of extended term of imprisonment." The plain language and structure of the Hate Crime Statute unquestionably establishes that the statute does not add any new elements to any crime as defined in the Code, but was intended only as a sentencing enhancer. *See Jones*, 119 S.Ct. at 1219 ("some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors") and *McMillan*, 477 U.S at 85-86 (express identification of statutory provision as sentencing factor).

The Supreme Court of New Jersey, however, chose not to rely upon this structural approach: "Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (Pa16). The court relied instead on the constitutional analysis employed by the *Almendarez-Torres* Court, thus removing all reservations about the constitutionality of the extended term provision of the Hate Crime Statute.

Any claim by petitioner that *Jones* leaves open the question whether any fact resulting in a substantial increase in the penalty range is necessarily an essential element that must be proven beyond a reasonable doubt is rebuffed by the *Jones* Court's outright approval of the challenged statute in *Almendarez-Torres* authorizing a sentencing court to increase the punishment for a recidivist deportee from two years imprisonment, 8 *U.S.C.* § 1326(a), to twenty years imprisonment, 8 *U.S.C.* § 1326(b)(2). *Jones*, 119 S.Ct. at 1227. The *Jones* Court said, "our decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Id.* at 1228 n.11. The penalty enhancer embodied in *N.J.Stat.Ann.* 2C:44-3e is based upon the traditional nature of motive as a sentencing factor; consequently, motive need not be charged in the indictment, *Almendarez-Torres*, nor must it be submitted to the jury and proven beyond a reasonable doubt, *Jones*.

Significantly, *N.J. Court Rule* 3:21-4(e) requires the prosecution to give notice to the defendant of its intention to seek an extended term under *N.J.Stat.Ann.* 2C:44-3e within fourteen days of the entry of the defendant's guilty plea or of the return of the verdict or, where the defendant is pleading guilty pursuant to a negotiated disposition, at or prior to the plea. *N.J.Stat.Ann.* 2C:44-3e permits the sentencing court to impose an extended term only after finding racial bias by a preponderance of the evidence. The Hate Crime Statute thus affords criminal defendants the requisite procedural safeguards of notice and opportunity to be heard. Compare *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (commitment proceedings under Colorado Sex Offenders Act did not permit defendant an opportunity to present his own evidence or confront witnesses against him). Petitioner here in fact knew of the State's intention to seek an extended term prior to the entry of his guilty plea (T9-20 to 10-8), and offered the

testimony of seven character witnesses and one expert witness at the sentencing hearing before Judge Ridgway. (Pa182-235). As such, *N.J.Stat.Ann.* 2C:44-3e comports with due process of law.

One final point bears noting. The Supreme Court of New Jersey did not "invite" this Court to review the extended term provision of New Jersey's Hate Crime Statute; what the state court said was that at some future date this Court, in its supervisory capacity, would likely scrutinize "the recently enacted amendments to the federal sentencing guidelines [which] now include a hate crime penalty enhancement provision that applies to all federal crimes." (Pa17-18). Petitioner, of course, was not sentenced under the federal statute and has no standing before this Court to challenge its constitutionality. The question presented by petitioner, "whether this Court should decline the invitation of the New Jersey Supreme Court" to review *N.J.Stat.Ann.* 2C:44-3e, should be answered with a resounding "yes."

In sum, New Jersey's Hate Crime Statute creates a constitutionally-valid statutory scheme permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying crime was racially motivated. The New Jersey Legislature did not create a new element of any offense that must be proven beyond a reasonable doubt, but took "one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." (Pa22). The conclusion reached by the Supreme Court of New Jersey that the Hate Crime Statute does not transgress the constitutional limits erected by this Court is firmly supported by this Court's decisions addressing the "sentencing factors versus elements" debate and insures that petitioner's constitutional rights were fully protected.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent

LISA SARNOFF GOCHMAN
Deputy Attorney General
Attorney of Record

Dated: October 20, 1999